Supreme Court, U.S.

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No.

In the

Supreme Court of the United States

B. WILLIS, C.P.A., INC.,

Petitioner,

v.

SURFACE TRANSPORTATION BOARD
and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the ICC Termination Act preempt state regulation of intrastate spur, industrial, team, switching, or side tracks and grant exclusive jurisdiction over such tracks to the Surface Transportation Board, even in the case of tracks which serve and/or are owned by only one shipper.

2. Whether a Certificate of Public Convenience and Necessity was required pursuant to 49 U.S.C., § 10901(a) before the railroad track constructed across petitioner's property, which is approximately ten (10) miles in length, cost approximately $26,000,000.00 to build and was constructed solely for and is used solely by a common carrier to transport full, complete, loaded, unit trains in a continuous through journey in interstate commerce, could lawfully be constructed or a common carrier may lawfully conduct such interstate operations over it.

PARTIES TO THE PROCEEDINGS

Petitioner

B. Willis, C.P.A., Inc., is a professional corporation wholly owned by Buck Willis, C.P.A. It has no subsidiaries.

Respondents

Surface Transportation Board and the United States of America

Interveners Below

Burlington Northern and Santa Fe Railway Company and Public Service Company of Oklahoma

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CITATION OF THE OFFICIAL AND UNOFFICAL REPORTS

The orders entered by both the Surface Transportation Board and the U.S. Circuit Court of Appeals for the District of Columbia were unpublished.

STATEMENT OF JURISDICTION

The U.S. Circuit Court of Appeals for the District of Columbia issued its judgment on November 26, 2002. Petitioner's Petition For Panel Hearing or in the Alternative Rehearing En Banc was denied on January 10, 2003. Jurisdiction is vested in this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

49 USC, § 10901(a) reads as follows:

> (a) A person may-
> (1) construct an extension to any of its railroad lines;
> (2) construct an additional railroad line;
> (3) provide transportation over, or by means of, an extended or additional railroad line: or
> (4) in the case of a person other than a rail carrier, acquire a railroad line or acquire or operate an extended or additional railroad line, only if the Board issues a certificate authorizing such activity under subsection (c).

49 U.S.C., § 10501(b) states:

(b)The jurisdiction of the Board over-

1.transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

2.the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided for under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

STATEMENT OF THE CASE

Procedural History

This appeal involves the review of the decision of the Surface Transportation Board (STB) in *B. Willis C.P.A., Inc.-Petition for Declaratory Order*, STB Finance Docket No. 34013 (served October 3, 2001). In that proceeding B. Willis, C.P.A., Inc. ("Willis") had sought a declaratory order that the railroad track constructed across its property and operated and used by the Burlington Northern and Santa Fe Railway

Company ("BNSF") is a railroad line subject to the exclusive jurisdiction of the Surface Transportation Board (STB) and for which a certificate of public convenience and necessity is required pursuant to 49 U.S.C., § 10901 before the line could be lawfully constructed, operated or used to provide transportation service over it in interstate commerce.

The STB held that it did not have jurisdiction over the track at issue on the theory that the track was a "private track" owned by Public Service Company of Oklahoma ("PSO").

Willis appealed the decision of the STB to the U.S. Court of Appeals for the District of Columbia, which had jurisdiction pursuant to 28 U.S.C. §§ 2321(a) and 2342(5). Willis asserted that the STB has exclusive jurisdiction over the track under 49 U.S.C., §10501 and that there is no such thing as a "private line exemption" as alleged by the STB in its decision. The U.S. Court of Appeals for the District of Columbia upheld the ruling of the STB.

Factual Background

PSO has a coal fired generating facility in Oologah, Oklahoma located adjacent to a main line of the Union Pacific Railroad (UP). Until the early 1990's BNSF was the only major rail carrier with track that ran to the mine from which PSO obtained its coal. However, the nearest BNSF mainline to PSO's generating facility was approximately 11 miles away. As a result, BNSF would transport the coal from the mine in Wyoming to Kansas City, Missouri. At that point the trains would be turned over to UP,[1] which transported the coal from

[1] When the arrangement began the track leading into the plant belonged to Missouri Pacific, which Union Pacific subsequently absorbed.

Kansas City to the generating facility in Oklahoma. In the early 1990's PSO began looking for ways to reduce its coal costs. BNSF offered to reduce the rate it was charging PSO if PSO would construct a railroad from BNSF's main line up to the generating station. It was agreed that PSO would construct the track instead of BNSF to "avoid potential delays at the ICC." BNSF's goal in having the track constructed was to eliminate the portion of the revenue going to its competitor. PSO agreed to construct the track when the net present value of the rate reductions it extracted from BNSF exceeded the cost of construction. Put another way, BNSF paid for the construction of the track through its rate reductions and as soon as the track was constructed BNSF took over operation of and dispatching over the track from its national operations center in Fort Worth, Texas pursuant to an "Industrial Track & Operating Agreement." BNSF transports PSO's coal in mile long unit trains that travel in a continuous journey from Wyoming to Oklahoma across as many as six (6) states. The bailment of the coal by PSO to BNSF does not terminate until after the trains travel down the track at issue and arrive at the unloading facility at the generating station.

PSO began efforts to assemble the right of way in 1992. PSO contacted Willis about obtaining a railroad easement across Willis' property and after preliminary discussions PSO sent Willis a "final offer letter" on October 2, 1992 in which PSO asserted:

> If you do not accept the sum offered, Public Service Company of Oklahoma, **AS A COMMON CARRIER**, will have no alternative but to seek, through condemnation, a Railroad Right-of-Way

> Easement across your property in Rogers County, Oklahoma. (Emphasis added.)

Willis did not accept this offer and on October 29, 1992, PSO filed a condemnation action under Oklahoma's railroad eminent domain statutes for a railroad right of way across Willis' property. When Willis challenged PSO's right to condemn the property, PSO, in flagrant violation of Willis' constitutional and statutory rights, seized the property and constructed the track and in March of 1995 BNSF began operating unit trains over the track as part of a continuous through journey in interstate commerce.

The Oklahoma Supreme Court, in June of 1997, issued a decision[2] that found the PSO's possession of Willis' property was in violation of Willis' constitutional and statutory rights and remanded the case back to the state district court for further proceedings. On June 2, 2000 PSO finally admitted in a response to a subpoena duces tecum that it did not have a certificate of public convenience and necessity from the ICC/STB to construct or operate the track. Willis then exhausted the procedures of the Oklahoma court system to have the condemnation action dismissed but was unsuccessful. Willis then brought a petition for a declaratory judgment before the STB seeking a determination that the on going state condemnation action was in violation of 49 U.S.C., §10901 under *Nicholson v. Missouri Pacific Railroad Company*, 366 ICC 69 (1982).

The STB ruled that there was no violation because it had no jurisdiction over the track because it was a "private line." Willis then appealed to the U.S. Court of Appeals for the District of Columbia, which upheld the ruling of the STB.

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[2] *Public Service Company v. B. Willis, C.P.A., Inc.*, 941 P.2d 995 (Okla. 1997)

ARGUMENT FOR GRANTING WRIT

The writ petitioned for should be granted because the U.S. Court of Appeals for the District of Columbia has:

I. decided an important question of federal law that has not been, but should be, settled by this Court;

II. decided an important question of federal law in a way that conflicts with relevant decisions of this Court; and

III. has so far departed from the accepted and usual course of judicial proceedings and sanctioned a departure from the accepted and usual course of proceedings by an administrative agency as to call for this Court's supervisory power.

I. THE ICC TERMINATION ACT PREEMPTS STATE REGULATION OF INTRASTATE SPUR, INDUSTRIAL TEAM, SWITCHING, OR SIDE TRACKS AND GRANTS EXCLUSIVE JURIDICTION OVER SUCH TRACKS TO THE SURFACEE TRANSPORTATION BOARD, EVEN IN THE CASE OF TRACKS THAT SERVE AND/OR ARE OWNED BY ONLY ONE SHIPPER.

The ICC Termination Act of 1995 was a major rewrite of federal railroad regulatory law and reflected an intent to help revive the financial condition of the railroad industry by reducing, but not abolishing,

regulatory burdens on the industry. S. Rep. No. 176, 104th Cong., 1st Sess. 3 (1995). "By preempting state regulation of railroad operations, and granting exclusive jurisdiction over the regulation of almost all aspects of railroad operations to the STB, Congress removes the ability of states to frustrate its policy of deregulating and reviving the railroad industry." *CSX Transportation Inc. v. Georgia Public Service Commission*, 944 F. Supp. 1573 (N.D. Ga. 1996) at 1583.

One of the new statutes enacted by the ICC Termination Act is found at 49 U.S.C., § 10501(b), which states:

> (b)The jurisdiction of the Board over-
>
> 1.transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
>
> **2.the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,**
>
> is exclusive. Except as otherwise provided in this part, the remedies provided for under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under

> Federal or State law. (Emphasis added.)

The provisions of sub-paragraph 2 were purposefully enacted. As the Court in *CSX Transportation Inc. v. Georgia Public Service Commission*, supra., at 1583 explained:

> Intrastate spur and side tracks were explicitly excluded from federal jurisdiction in the ICC Termination Act's predecessor, the Staggers Rail Act. * * *Given the states' exclusive jurisdiction over spur and side tracks under the Staggers Rail Act, it is understandable that Congress proceeded with extreme clarity in making federal jurisdiction over intrastate tracks exclusive in the ICC Termination Act.

Every decision dealing with the preemptive effect of the ICC Termination Act prior to the decision under appeal, including those by the STB, asserted that the act completely preempted state regulation of any aspect of railroad operations, including "private track" used in interstate commerce.

In *BNSF Corp. v. Anderson*, 959 F. Supp. 1288, 1295 (Dist. Mont. 1997) the Court stated:

> The ICCTA contains an express preemption clause, providing that the remedies stated hereunder with respect to regulation of rail transportation are exclusive and that those remedies preempt the remedies provided under federal or state law. **The Act reserved**

> **no area of regulation for the individual states**-agency regulation or otherwise. (Emphasis added)

The STB noted in STB Finance Docket No. 33971, *Joint Petition for Declaratory Order- Boston and Maine Corporation and Town of Ayer, Ma.*, (served May 1, 2001):

> As the court stated in CSX Trans., v. Georgia Pub. Serv. Comm'n, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996), "[I]t is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations" than that contained in section 10501(b).

Shortly after the ICC Termination Act took effect, the STB issued a public notice, which stated, "that the authority of certain states to regulate intrastate rail matters was terminated by the ICC Termination Act of 1995, effective January 1, 1996." STB Public Notice, Ex Parte No. 388, April 3, 1996.

Barely three (3) months before issuing the decision that lead to the present appeal, the STB issued a ruling in **STB Finance Docket No. 34020, Fletcher Granite Company, LLC- Petition for Declaratory Order (served June 29, 2001)** that dealt with a private track that only served the owning shipper and was not even used by a common carrier. The STB noted, "Fletcher laid the rail track on its property and provided its own rail service to the B&M interchange." Nonetheless, the STB made no claim that it lacked jurisdiction under a private track exemption but rather advised the parties that the STB had exclusive jurisdiction over the track.

To appreciate the importance of the issues at stake in this case it is necessary to understand two (2) points. First, frequently, spur or side tracks are privately owned and/or serve only one shipper and secondly, that there has been an explosion in construction of such private tracks in recent years. In fact, it would probably be accurate to say that construction of tracks by electric utilities, such as the track at issue here, constitute the bulk of all new railroad construction in the United States today. As one commentator observed:

> Recently a new phenomenon has been spreading through the electric utility industry: coal-burning electrics, in increasing numbers, are getting into the railroad business for themselves.[3]

In *Illinois Commerce Commission v. I.C.C.*, 879 F.2d 917 (D.C. Cir. 1989) at 919 N. 6, the Court noted:

> Comments in opposition to the petition were filed by C. Franke and Company, Inc., **the only shipper served by the spur**: (Emphasis added.)

In *New York Cent. Ry. Co. v. Southern Ry.*, 226 F.Supp. 463 (N.D. Ill. 1964), *aff'd* 338 F.2d 667 (7th Cir. 1964), *cert. denied*, 380 U.S. 954 (1965), *reh'g denied*, 381 U.S. 907 (1965) the Court noted the rail carrier:

> sends its cars for loading or unloading to the mine over track owned and maintained by the

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[3] *Do-it yourself "Electric " Coal Trains*, Avery, Donald G., Public Utilities Fortnightly, June 15, 1991

> shipper. Such service is frequently rendered over private track...
> *New York Central*, 266 F. Supp. at 474

Furthermore, 49 U.S.C., § 11103 states in part (emphasis added):

> (a) On application of the owner of a lateral branch line of railroad, or of a **shipper** tendering interstate traffic for transportation, a rail carrier providing transportation subject to the jurisdiction of the Board under this part shall construct, maintain, and operate, on reasonable conditions, a switch connection to connect that branch line or **private side track** with its railroad...

In the decision under appeal the Circuit Court of Appeals held as follows:

> The Board argues that § 10501(a) is the only provision granting the Board jurisdiction, and that § 10501(b) does not expand the Board's jurisdiction, but only renders the jurisdiction granted in § 10501(a) exclusive. Under this interpretation, which the Board made explicitly only at oral argument, the Board has jurisdiction only over common carrier track. See *Hanson Natural Resources Co.*, STB Financial Docket No. 32248, 1994 WL 673712 (Nov. 15, 1994).

In the Respondents' brief before the Circuit Court of Appeals was the assertion:

> The absence of jurisdiction under the ICA means that this private track will not enjoy the broad Federal preemption of section 10501(b) and therefore will be subject to state or local laws and regulations.

The contention of Respondents, which the Circuit Court of Appeals affirmed, is absurd on its face and contradicts the plain wording of the statute. If the "interpretation" of the Board were correct there is absolutely no reason for § 10501 (b)(2) to be in the statute and in fact such an "interpretation" reads (b)(2) completely out of the statute.

Moreover, such an interpretation completely reverses Congressional policy to completely preempt any state or local regulation of railroad operations. BNSF has attested in a sworn affidavit that without the track at issue interstate rail traffic and "millions of dollars of revenues" would be diverted from BNSF to its primary competitor, Union Pacific. However, both the STB and the Circuit Court of Appeals now assert that this track and the unit trains that travel over it as part of a through journey in interstate commerce are at the mercy and whims of state and local officials.

However, it is highly unlikely that state and local officials would attempt to regulate the track at issue. As previously noted, PSO asserted at the state and local level that it was constructing the track as a common carrier. In fact, since the track's construction it has been shown on the *Oklahoma Official Railroad Map* as

a Class III railroad.[1] As a result, if the decision under appeal is allowed to stand, the track will enjoy the status of:

> ...leaving it entirely unregulated, the public interest unprotected, and parties affected... without recourse.

Illinois Commerce Commission v. I.C.C., 879 F.2d 917, 924 (D.C. Cir. 1989)

The attempt to rely on *Hanson Natural Resources* is equally absurd. The decision was handed down in 1994 over a year prior to the effective date of the ICC Termination Act. As the Court in *CSX Transportation Inc. v. Georgia Public Service Commission*, supra., at 1583 went to great lengths to explain, the language found in § 10501 (b)(2) was deliberately inserted to reverse the previous law, which was in effect when the *Hanson* decision was issued.

Even more important, however, is that the language relied on in *Hanson* concerning private lines was pure dicta. Then Commissioner, now STB Chairman, Morgan wrote a concurring opinion in *Hanson* in which she correctly characterized the language as "gratuitous diversions into novel legal theory" and "some novel and untested legal theories-concerning for example, the classification of different kinds of railroad in general and, in particular the so-called "private line exemption.""

The reason the language in *Hanson* about a private line exemption was "gratuitous" is because it was not the issue under adjudication and therefore the statements in the decision on that subject are not

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[1] This map is published biannually by the Oklahoma Department of Transportation.

binding authority. *Kastigar v. United States*, 406 U.S. 441, 454-455, 93 S.Ct. 1653, 1662 (1972).

In essence, the theory of the STB and the Circuit Court of Appeals is that even though the track at issue is operated by BNSF under a track operating agreement and used by unit trains traveling in interstate commerce, the STB lacks jurisdiction over both the track and the interstate unit trains because the track is technically owned by the only shipper that the track serves and BNSF does not provide common carrier service to other shippers over the track. This holding, in addition to ignoring the plain wording of § 10501 (b)(2), also ignores the plain wording of 49 U.S.C., § 10102, which states in part (emphasis added):

> (6) "railroad" includes-
>
> (B) the road used by a rail carrier and owned by it **or operated under an agreement...**
>
> (9) "transportation" includes-
>
> (A)...property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, **regardless of ownership** or an agreement concerning use.

The wording and intent of the statutes is clear and unambiguous. The STB and the Circuit Court of Appeals have simply ignored the plain wording of the statutes and the intent of Congress to totally preempt the field of railroad regulation.

II. THE CIRCUIT COURT OF APPEAL HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND SANCTIONED A DEPARTURE FROM THE ACCEPTED AND

USUAL COURSE OF PROCEEDINGS BY AN ADMINISTRATIVE AGENCY AS TO CALL FOR THIS COURT'S SUPERVISORY POWER.

The decision of the Circuit Court of Appeals is based solely on the following finding:

> The Board argues that § 10501(a) is the only provision granting the Board jurisdiction, and that § 10501 (b) does not expand the Board's jurisdiction, but only renders the jurisdiction granted in § 10501(a) exclusive. Under this interpretation, **which the Board made explicitly only at oral argument**, the Board has jurisdiction only over common carrier track. See *Hanson Natural Resources Co*, STB Financial Docket No. 32248, 1994 WL 673712 (Nov. 15. 1994). (Emphasis added.)

FRAP 28(b) states in part:

> **(b) Appellee's Brief**. Appellee's brief must confirm to the requirements of Rule 28(a)(1)-(9) and (11),...

FRAP 28(a)(9) states in part:

> (a) Appellant's Brief. Appellant's brief must contain, under appropriate headings and in the order indicated:...
> (9) the argument which must contain:
> (A) Appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies:

The Circuit Court of Appeals long ago recognized that:

> Rule 28 has been read generally as foreclosing consideration of issues not raised in briefs filed by appellants and appellees.
> *Consumer Union of United States, Inc. v. Federal Power Commission*, 510 F.2d 656 (D.C. Cir. 1974) at 662, N. 9.

This rule that an argument not raised in the brief of a party could not be belated raised at oral argument has been adopted through out the Circuits.

> Except for extraordinary circumstances not present here, a court of appeals will not consider an issue raised for the first time at oral argument.
> *Piazza v. Aponte Roque*, 909 F.2d 35, 37 (1st Cir. 1990)

> We normally do not consider arguments raised only at oral argument.
> *U.S. v. $557,933.89*, 287 F.3d at 78 (2nd Cir. 2002)

> Arguments presented for the first time at oral argument are waived.
> *Comsat Corp. v. F.C.C.*, 250 F.3d 931, 936 N. 5. (5th Cir. 2001)

> Our general rule is that "a parties failure to raise or discuss an issue in his brief is to be deemed an abandonment of that issue."
> *U.S. v. Eldeeb*, 20 F.3d 841, 843 (8th Cir. 1994)

> Durham's attorney raised three new issues at oral argument...We disregard these arguments because Durham did not raise them...in her brief. *Durham v. Xerox Corp.*, 18 F.3d 836, 841 N. 4. (10th Cir. 1994)

The reasoning behind this rule is obvious. Parties must be put on notice of the arguments of the opposing party and afforded an opportunity to respond in a brief.

> We require petitioners and appellants to raise all of their arguments in the opening brief to prevent "sandbagging" of appellees and respondents and **to provide opposing counsel the chance to respond**. *Corson and Gruman Company v. N.L.R.B.*, 899 F.2d 47, 50 N. 4. (D.C. Cir. 1990) (Emphasis added.)

See also *Charter Oil Co. v. American Employers, Ins. Co.*, 69 F.3d 1160 (D.C. Cir. 1995), *Bd. of Regents of University of Wash. v. E.P.A.*, 86 F.3d 1214 (D.C. Cir. 1996), *Students Against Genocide v. Department of State.* 257 F.3d 828 (D.C. Cir. 2001), *Alabama Power Co. v. Gorsuch*, 672 F.2d 1 (D.C. Cir. 1982), *Carducci v. Regan*, 714 F.2d 171 (D.C. Cir. 1983), *Boggs v. Rubin*, 161 F.3d 37 (D.C. Cir. 1998).

The rule that a court of appeal will not consider an argument not made in a party's brief but raised for the first time at oral argument is also consistent with D.C. Circuit Rule 34(a), which states in part:

> (a) **Substance and Style of Oral Argument**. Oral argument should undertake to emphasize and clarify the

> written argument appearing in the briefs.

Obviously, making entirely new arguments not mentioned in the briefs is outside the intended scope of the oral argument. To base a decision on such arguments of which the opposing party had no prior notice is to deprive that party of a meaningful opportunity to be heard in rebuttal. As the U.S. Supreme Court held long ago:

> The fundamental requisite of due process of law is the opportunity to be heard...But when notice is a person's due, process which is a mere gesture is not due process. *Mullane v. Central Hanover Trust Co.*,339 U.S. 306 (1950).

In its initial brief, Willis raised the wording of § 10501 (b)(2) and further repeatedly both cited and quoted from the Surface Transportation Board's decision in Finance Docket No. 34020, *Fletcher Granite Company, LLC-Petition for Declaratory Order* (served June 29, 2001) in which the STB asserted that under the language of § 10501 (b)(2), the Board had jurisdiction over private, shipper owned track over which there was no common carrier service. In spite of the fact that Willis clearly raised the issue in its initial brief, the Board made no attempt to rebut or explain away either the plain wording of the statute or the Board's own prior decision on this issue. Instead, for the first time at the oral argument, and after Willis had completed used its allotted ten (10) minutes of argument time, the Board made an argument that completely "sandbagged" Willis and for which Willis has had no meaningful opportunity to be heard in rebuttal.

As a result, the decision of the Circuit Court of Appeals clearly violates the accepted and usual course of judicial proceedings.

The Circuit Court of Appeals furthered erred in deferring to the STB decision based on its own decision in *Oklahoma Natural Gas Co. v. FERC*, 28 F.3d 1281 (D.C. Cir. 1994). That decision, in turn, was based on this Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense*, 104 S. Ct. 2778, 467 U.S. 837 (1984).

The Circuit Court of Appeals completely ignored the fact that *Chevron* created a two (2) pronged test.

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. **First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.** If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in tne absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. *Chevron*, at 2781, 2782. (Emphasis added.)

This Court emphasized the same point in *Connecticut National Bank v. Germain* 503 U.S. 249, 253, 112 S.Ct.1146, 1149:

> In any event, canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there*** **When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."** (Emphasis added.)

In addressing the application of *Chevron* to the preemptive effect of the ICC Termination Act, one Court noted:

> Also, *Chevron* is only applicable "where the plain meaning of the express terms of a statute is unclear." *** Because the Court finds that Congress has spoken directly to the issue of the preemptive effect of the ICC Termination Act, the *Chevron* framework is irrelevant.

CSX Transportation Inc. v. Georgia Public Service Commission, supra., at 1584.

There is nothing about § 10501 (b) that is ambiguous or delegates to the STB the authority to grant the state and local authorities jurisdiction over track

that is used by complete unit trains in a continuous, through journey in interstate commerce. In fact, it is the interpretation of the Board that is implausible on its face. 49 U.S.C. § 10501 (b) states:

> The jurisdiction of the Board over-
> 1.transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
> 2.**the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,**
> is exclusive. Except as otherwise provided in this part, the remedies provided for under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law. (Emphasis added).

Nowhere does it say "except if owned by shpper."

The Circuit Court of Appeals further departed from the accepted and usual course of judicial

proceedings by allowing the STB to ignore its own prior decisions without any explanation.

Barely three (3) months before issuing the decision that lead to the present appeal, the STB issued a ruling in **STB Finance Docket No. 34020, Fletcher Granite Company, LLC- Petition for Declaratory Order (served June 29, 2001)** that dealt with a private track that only served the owning shipper and was not even used by a common carrier. The STB noted, "**Fletcher laid the rail track on its property and provided its own rail service to the B&M interchange.**" (Emphasis added.) Nonetheless, the STB made no claim that it lacked jurisdiction under a private track exemption but rather advised the parties that the STB had exclusive jurisdiction over shipper owned track over which there was no common carrier service. The track at issue in the case at bar is used by complete, unit trains in interstate commerce but the STB claims that it has no jurisdiction.

In its decision, the STB made no attempt to explain this obvious contradiction or give any reason for a change in its policy.

In *Baltimore & Annapolis R. v. Wash. Metro Area Tran.*, 642 F2d 1365, 1371 (D.C. Cir. 1980) the Court stated:

> Given the comparative novelty of the conclusion...and its lack of consistency with a prior Commission ruling, we find ourselves obliged to do more than merely defer to the Commission's conclusion... We must make **an independent judgment**, examining with a more exacting vigilance than we might have employed had the Commission's decision not conflicted. A **demanding judicial**

> **review** is also indicated by the consequences of the Commission's latest interpretation..."[e]fforts of an administrator or administrative agency to enlarge or restrict the application of a statute should be subjected to **close scrutiny**."* * * (Emphasis added.)

In *Office of Com. Of United Church of Christ v. F.C.C.*, 707 F.2d 1413, 1425 (D.C. Cir. 1983) the Court stated:

> While we do not then challenge the Commission's theoretical right to modify, or even overrule, long-standing precedents, such abrupt shifts in policy constitute **"danger signals" that the Commission may be acting inconsistently with its statutory mandate**. We will require therefore that the Commission provide a "reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored* * *" (Emphasis added.)

In *Greater Boston Television Corporation v. F.C.C.*, 444 F.2d 841, 851, 852 (D.C. Cir. 1970) the Court stated:

> Its supervisory function calls on the court to intervene not merely in case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of **danger signals**, that the agency has not really

> taken a "hard look" at the salient problems, and **not genuinely engaged in reasoned decision-making**...But an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored and if agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute. (Emphasis added.)

As previously noted, prior to the decision under appeal, the Board repeatedly held that it had exclusive jurisdiction over all track that was part of the general railroad system of transportation, even if in cases where the track was privately owned with no common carrier service over it. STB Finance Docket No. 33466, *Borough of Riverdale-Petition for Declaratory Order-The New York Susquehanna and Western Railway Corporation*, (served February 27, 2001); STB Finance Docket No. 33971, *Joint Petition for Declaratory Order-Boston and Maine Corporation and Town of Ayer, Ma.*, (served May 1, 2001); STB Finance Docket No. 34020, *Fletcher Granite Company, LLC-Petition for Declaratory Order* (served June 29, 2001). As a result, the STB decision under appeal clearly contradicts the Board's prior decisions without explanation and attempts to restrict the application of a statute, 49 U.S.C. § 10501 (b)(2).

This in turn, under the prior decisions of the Circuit Court of Appeals, triggered a requirement for denovo review. Because the Circuit Court of Appeals' decision merely "rubber stamped" an agency "interpretation" that contradicts not only the plain wording of the statute, but the STB's prior decisions on the same issue without explanation, both the Circuit

Court of Appeal and the STB have departed from the accepted and usual course of judicial proceedings.

III. THE TRACK AT ISSUE IS A LINE OF RAILROAD SUBJECT TO THE REQUIREMENTS OF 49 U.S.C., §10901.

The statutes requiring prior approval by the ICC before railroad track to be used in interstate commerce could be constructed was originally enacted as part of the Transportation Act of 1920 and codified as 49 U.S.C.A., §1(18). Under the statutory scheme track that was considered a "line of railroad" or main line track could not be constructed without a certificate of public convenience and necessity from the ICC. Track that was considered spur, industrial, switching or sidetrack was exempt from this requirement and thus outside of federal jurisdiction. However, the statutes did not define the difference between "railroad line" and "spur, industrial, switching and side track." In *Nicholson v. Missouri Pacific Railroad Company*, 366 ICC 69, 72 (1982) the ICC stated, "The term "railroad line" is not defined in the act nor is the legislative history helpful in resolving the issue... Accordingly, we must look to case law and common sense..."

Courts have developed several different tests to classify track as either main line or spur track but two tests have been relied on most frequently: the use of the tracks by complete trains as part of a continuous through movement in interstate commerce and the use of the track by a railroad to extend its operations into an area already served by another carrier. In *Nicholson v. I.C.C.*, 711 F2d 364 (D.C. Cir. 1983) the Court gave a comprehensive summation of the law:

> It is well established that the determination of whether a particular track segment is a "railroad line," requiring

commission authorization pursuant to section 10901(a), or a "spur, industrial, team, switching, or side" track, exempt from Commission jurisdiction pursuant to 10907(b**), turns on the intended use of the track segment**, not on the label or cost of the segment. It was held early on that it is sufficiently plain, from a consideration of the obvious purpose prompting the [Interstate Commerce Act] but also of the general nature of the tracks mentioned, that **Congress intended *to subject to the requirements of [section 1(18)]* so-called main or branch lines of railroad, that is, *lines designed and used for continuous transportation service by through, full trains between different points of travel*...** Shortly thereafter, the Supreme Court held that:

[I] f the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of [section 1(18) of the Act], although the line be short and although the character of the service contemplated be that commonly rendered...by means of spurs or industrial tracks.

Texas & P. Ry. v. Gulf, Colo. & S.F. Ry. 270 U.S. 266, 278, 46 Sp. Ct. 263, 266, 70 L.Ed.578 (1926)...**Thus it can be seen that track segments which are intended to be used to carry through**

> **trains between points of shipment and delivery,** particularly those segments which extend a railroad's service into new territory, **must be approved by the Commission pursuant to section 10901(a).**

Nicholson v. I.C.C., supra at 367,368. (Bold emphasis added.)

The classification of track as requiring a certificate if used by complete through trains has been adopted in a number of circuits. See *Hughes v. Consol-Pennsylvania Coal Co.*, 945 F.2d 594, 612 (3d Cir. 1991), *Railway Labor Exec. Ass'n v. City of Galveston, Texas*, 849 F.2d 145, 148 (5th Cir. 1988), *New Orleans Terminal Company v. Spencer*, 366 F.2d 160, 165-66 (5th Cir. 1966), I.C.C. *v. Memphis Union Station Company*, 360 F.2d 44, 50,51(6th Cir. 1966), *Brotherhood of Locomotive Engineers v. U.S.*, 101 F.3d 718, 729,730 (D.C. Cir. 1996).

Moreover, track that meets the extension of service test falls under the purview of 49 U.S.C. § 10901 even if the track would otherwise be considered spur or industrial track.

> If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks. Being an extension, it cannot be built unless the federal Commission issues its certificate that

> public necessity and convenience require its construction.

Texas & P. Ry. v. Gulf, Colo. & S.F. Ry. 270 U.S. 266, 278, 46 Sp. Ct. 263, 266, 70 L.Ed.578 (1926)

> In the cases before us, for example, although the ICC may focus on the tenant railroad's use of the tracks solely for switching operations as the controlling factor in determining the tracks' character, if those switching operations have the effect of substantially extending the tenant railroads' lines into new territory, ther the Commission may not decline jurisdiction.

Brotherhood of Locomotive *Engineers v. U.S.*, 101 F.3d 718, 728 (D.C. Cir. 1996)

The track at issue was constructed at the instigation of BNSF and financed by it through rate reductions. Its only purpose is allow BNSF to invade UP's service area and divert "millions of dollars of revenues" from its main competitor to itself. The claim that BNSF and PSO can completely circumvent the entire scheme of federal railroad regulation by the simple subterfuge of having PSO build the track and then turn it over to BNSF under a track operating agreement is absurd. As the U.S. Supreme Court has stated:

> The mere fact that a railroad lies wholly within one state, and is to be built by an independent corporation, does not of course, prevent the application of paragraphs 18 to 22. If it undertakes to engage in interstate commerce, its operation becomes immediately a matter

> of national concern and it comes within the purview of those paragraphs.
> *Texas & N.O.R. Co. v. Northside Belt Ry. Co.*, 276 U.S. 475, 48 S. Ct. 361, 362 (1928).

> ...Congress did not intend its railroad regulatory provisions to depend on who had legal title to transportation instrumentalities...these definitions by their unambiguous language, make all trackage "in use by a common carrier" subject to the regulatory provisions of the Act, even though not owned by the carrier, but only used by it under a contract or agreement.

United States v. Baltimore & Ohio R. Co., 333 U.S. 169, 176, 68 S.Ct.494, 498 (1948).

CONCLUSION

The decision of the Circuit Court of Appeals should be reversed as it directly contradicts the plain wording of the applicable statutes and all relevant prior decisions of the United States Supreme Court, the D.C. Circuit, the ICC and the STB itself. The track at issue and BNSF's interstate operations over it are subject to the jurisdiction of the STB and 49 U.S.C., §10901 and the ongoing state condemnation action is a violation of that statute the STB is charged with enforcing.

Respectfully submitted,

William T. Dickson
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1369 South Garnett

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Tulsa, Oklahoma 74128
918-629-0449

(Any footnotes trail the end of each document.)
No. 01-1441

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

B. WILLIS, C.P.A., INC.,
PETITIONER

v.

SURFACE TRANSPORTATION BOARD AND
UNITED STATES OF AMERICA,
RESPONDENTS

PUBLIC SERVICE COMPANY OF OKLAHOMA D/B/A
AMERICAN ELECTRIC POWER COMPANY, INC., AND
BURLINGTON NORTHERN AND SANTA FE RAILWAY
COMPANY,

INTERVENORS

FILED NOVEMBER 26, 2002

Petition for Review of an Order of the Surface Transportation Board

Before: RANDOLPH and ROGERS, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

JUDGMENT

This cause was considered on the record from the Surface Transportation Board and on the briefs filed by the parties and oral arguments of counsel. It is

ORDERED AND ADJUDGED that the petition for review be denied.

Under 42 U.S.C. § 10501, "the Board has jurisdiction over transportation by rail carrier," id. § 10501(a)(1); moreover, the Board's jurisdiction over "the construction . . of spur tracks . . . is exclusive," id. § 10501(b)(2). A "rail carrier" is defined as "a person providing common carrier railroad transportation for compensation." Id. § 10102(5).

The Board argues that § 10501(a) is the only provision granting the Board jurisdiction, and that § 10501(b) does not expand the Board's jurisdiction, but only renders the jurisdiction granted in § 1 050 1(a) exclusive. Under this interpretation, which the Board made explicitly only at oral argument, the Board has jurisdiction only over common carrier track. See Hanson Natural Resources Co. , STB Financial Docket No. 32248, 1994 WL 673712 (Nov. 15, 1994). Willis contends that § 10501(b)(2) confers upon the Board jurisdiction over all track, regardless whether it is used for private or common carriage. This interpretation is implausible on its face, and the Board, in determining that it has no jurisdiction over private tracks, has rejected it. See Oklahoma Natural Gas Co. v. FERC, 28 F.3d 1281, 1284 (D.C. Cir. 1994). We therefore agree that the Board does not have jurisdiction over this dispute.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. See FED. R. APP. P. 41(b); D.C. CIR. R.41.

Per Curiam
FOR THE COURT:

Mark J. Langer, Clerk

BY:
Dorothy E. Barrack
Deputy Clerk

SERVICE DATE - OCTOBER 3, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34013
B. WILLIS, C.P.A., INC. —
PETITION FOR DECLARATORY ORDER

Decided: October 1, 2001

On February 15, 2001, B. Willis, C.P.A., Inc. (petitioner), filed a petition seeking a declaratory order that certain railroad track — constructed across its property by Public Service Company of Oklahoma d/b/a American Electric Power Company (PSO) and used by The Burlington Northern and Santa Fe Railway Company (BNSF) — is a line of railroad and as such cannot lawfully be constructed or operated without first obtaining authority from the Board under 49 U.S.C. 10901. Replies to the petition have been submitted by BNSF and PSO. On August 30, 2001, and September 4, 2001, petitioner filed motions for expedited adjudication to which PSO and BNSF have jointly replied. For the reasons discussed below, the petition will be denied and a declaratory order proceeding will not be instituted.

Preliminary Matter. Petitioner has tendered responses to the PSO and BNSF pleadings, claiming that those pleadings are actually motions to dismiss its petition. BNSF and PSO have jointly moved to strike the petitioner's tendered replies, on the ground that they are nothing more than replies to the replies and as such are

prohibited under the Board's Rules of Practice at 49 CFR 1104.13(c).

Under 49 CFR 1104.13(a), parties can file replies or motions within 20 days after a pleading is filed. PSO and BNSF timely filed what each termed a "reply." Petitioner claims that, because those pleadings use terms such as "summarily reject," "forthwith to dismiss," and "decline . . . to reach the merits," they are actually motions to dismiss. There is no need to resolve this issue because, given the decision reached here on the petition for declaratory order, no party will be prejudiced by acceptance of petitioner's replies. The joint motion to strike will thus be denied.

Background. Petitioner owns a tract of land in Rogers County, OK. In October 1992 PSO filed an eminent domain proceeding pursuant to State law to condemn, inter alia, a right-of-way across this tract of land, for the purpose of constructing railroad track over which BNSF would move unit coal trains to and from PSO's electric power generating facility at Oologah, OK. (This facility is located on or adjacent to a main line of the Union Pacific Railroad Company, which handled coal deliveries until the track connection to BNSF's line was constructed.) PSO took possession of the right-of-way in March 1994 and constructed the railroad track, which connects the Oologah plant to BNSF's main line. BNSF began using the track in March 1995.

Petitioner is challenging PSO's use of eminent domain power to condemn its property in the State courts, on grounds, inter alia, that the condemnation was not for a lawful public purpose. The Oklahoma Supreme Court has remanded that matter to the Rogers County District Court for hearing on this issue. Public Service Company v. B.

Willis, C.P.A., Inc., 941 P.2d 995 (Okla. 1997). PSO maintains that a shipper can build a private track without Board approval. BNSF also takes the position that the track is either private track or a spur and that in either event construction and operation of this track do not require Board authorization.[1]

Discussion. Under 5 U.S.C. 554(e), the Board has discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty where the Board has subject-matter jurisdiction.[2] Here, the request for a declaratory order will be denied because the record indicates that the track at issue is private track and thus does not require authorization by the Interstate Commerce Commission (ICC) (prior to January 1, 1996) or the Board (on or after that date) for its construction or operation.[3]

Under the statute, the Board has jurisdiction over "transportation by rail carrier," 49 U.S.C. 10501(a)(1), with the term "rail carrier" defined as "a person providing common carrier railroad transportation for compensation," 49 U.S.C. 10102(5). The agency's

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[1] BNSF also argues that the petition filed with the Board is untimely, violating the doctrine of laches, and is a collateral attack on the State court condemnation proceeding. These arguments need not be reached in view of the substantive conclusions here regarding the status of the line.

[2] The responsibility of whether to institute requested declaratory order proceedings has been delegated by the Board to the Director of the Office of Proceedings. See 49 CFR 1011.8(c)(6).

[3] In the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), Congress abolished the ICC and transferred the remaining rail regulatory responsibilities to the Board, effective January 1, 1996.

jurisdiction does not extend to private rail operations (those not operated for hire). This was also true of the ICC's jurisdiction over rail carriers before passage of ICCTA.[4]

In other words, there is a category of rail operations that falls outside the Board's statutory jurisdiction. It consists of private tracks, typically built and maintained by a shipper (or for a shipper at the shipper's expense) and operated by the shipper (or its contractor) to serve only that shipper, moving the shipper's own goods, so that there is no "holding out" to serve other shippers for compensation. Private tracks constitute a narrow, limited category of rail operations. But as long as rail track is constructed and operated in a manner that does not constitute common carriage, rail track can be built and operated in private status not subject to the Board's jurisdiction.

Under 49 U.S.C. 10901(a), an extension to a railroad line or an additional railroad line may be constructed only with Board authorization. However, this applies only to railroad lines that are subject to the agency's jurisdiction — not private tracks. See Hanson Natural Resources

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[4] The ICCTA Conference Report explains, at 166: "To clarify that only providers of rail transportation for compensation are within the scope of the statute, the definition of 'rail carrier' is limited to persons providing *common carrier* rail transportation." H.R. Rep. No. 422, 104th Cong., 1st Sess. (1995) (Conference Report).

Company — Non-Common Carrier Status — Petition for Declaratory Order, ICC Finance Docket No. 32248 (ICC served Dec. 5, 1994) at 20-21 (Hanson).

Operations over private tracks can be conducted by the shipper/owner itself, or the shipper/owner of the private track may arrange for a contractor to conduct operations over the track. As noted in Hanson, in New York Cent. R. Co. v. Southern Ry., 226 F. Supp. 463 (N.D. Ill. 1964), aff'd, 338 F.2d 667 (7th Cir. 1964), cert. denied, 380 U.S. 954 (1965), reh'g denied, 381 U.S. 907 (1965) (New York Central), the court indicated that a common carrier operating over private track would not fall under the statutory requirements of what is now section 10901 with respect to those operations, so long as it does not perform common carriage service on the private track and it does not maintain that track with its own funds.[5]

Here, PSO submitted a verified statement stating that it paid all of the construction cost of the track and owns it. It also asserts that it has not been, and has no intention of becoming, a common carrier, and it has not held out to, or granted BNSF rights to, provide service

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[5] Petitioner cites United States v. B. & O. R. Co., 333 U.S. 169 (1947), for the proposition that the ICC/Board's jurisdiction applies even when noncarriers construct track that is used in interstate commerce. That case is distinguishable because th e common carrier railroad served shippers other than the owner of the track, and thus the track could not be considered private. Also, petitioner claims, citing Staten Island Rapid Transit Op. Auth. v. ICC, 718 F.2d 533 (2d Cir. 1983) (SIRTOA), that, because BNSF controls the PSO track, it is a BNSF line under ICC/Board jurisdiction. SIRTOA is not on point. It involved a determination as to whether an entity providing passenger service was a carrier within the meaning of the Railway Labor Act. It did not involve the distinction between private track and common carrier lines.

over the line to any other shipper. V.S. Cox at 4-5. Moreover, under the New York Central analysis, PSO states that BNSF does not own the line in fee or through an easement, does not spend its funds to maintain the line, and serves only PSO, which is the only shipper that is able to receive shipments on the line.

Petitioner asserts that, under the Supreme Court's decision in Texas & Pacific v. Gulf, Colorado & Santa Fe Ry., 270 U.S. 266 (1926), the construction of an extension to a rail line, or an additional rail line, that enables a railroad to penetrate or invade new territory falls under the agency's jurisdiction under section 10901. The "invade new territory" test, however, is not applicable to private track, which is outside the agency's jurisdiction.

Petitioner cites Public Service Company of Colorado - Construction Exemption - Pueblo County, CO, STB Finance Docket No. 33862 (STB served Aug. 23, 2000), where track constructed by the Public Service Company of Colorado (PSCo) was found to come under the Board's section 10901 jurisdiction. In that proceeding, however, the Board noted, at 4, that "[w]hile PSCo will be the only shipper served by the line, PSCo states that other shippers would be permitted to use the rail line in the future should a demand arise." Thus, PSCo was holding out potential service to other shippers, and thus the track was not private track.

Finally, petitioner quotes Nicholson v. Missouri Pacific Railroad Company, 366 I.C.C. 69 (1982) (Nicholson), aff'd sub nom. Nicholson v. ICC, 711 F.2d 364 (D.C. Cir. 1983), cert. denied, 464 U.S. 1056 (1984), for the proposition that a condemnation proceeding triggers the licensing requirements of section 10901. However, the ICC in that proceeding was examining operations that were

subject to its jurisdiction.[6] Nicholson has no application to private track.

Fundamentally, the controversy between petitioner and PSO is a question of eminent domain powers under State law, and not an issue for the Board. The question of whether PSO, as a public utility, may exercise eminent domain powers under the laws of the State of Oklahoma to construct a private line to serve its own facility is a question that arises, and must be answered, under State law. But as far as this agency is concerned, if a shipper does not hold out to provide common carrier railroad service over a line it constructs and maintains to serve its own facility, and no other shippers are served by the line, then neither that construction, nor a railroad's operation over that track to reach the shipper's facility, requires ICC or Board authorization or approval.

Conclusion. Accordingly, the declaratory relief requested will not be granted and a proceeding will not be instituted.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition for a declaratory order is denied.

2. The joint motion to strike is denied.

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[6] In Nicholson, the ICC ultimately concluded that its authorization was not needed for construction of the track because it was yard track, which came within the licensing exce ption of former 49 U.S.C. 10907 (now 49 U.S.C. 10906).

3. This decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams

Secretary

No. 01-1441

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

B. WILLIS, C.P.A., INC.,
PETITIONER

v.

SURFACE TRANSPORTATION BOARD AND
UNITED STATES OF AMERICA,
RESPONDENTS

PUBLIC SERVICE COMPANY OF OKLAHOMA D/B/A
AMERICAN ELECTRIC POWER COMPANY, INC., AND
BURLINGTON NORTHERN AND SANTA FE RAILWAY
COMPANY,

INTERVENORS

FILED JANUARY 10, 2003

BEFORE: Randolph and Rogers, CircuitJudges, and Williams, Senior Circuit Judge

ORDER

Upon consideration of petitioner's petition for rehearing filed December 23, 2002, it is

ORDERED that the petition be denied.

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

No. 01-1441

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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AMERICAN ELECTRIC POWER COMPANY, INC., AND
BURLINGTON NORTHERN AND SANTA FE RAILWAY
COMPANY,

INTERVENORS

FILED JANUARY 10, 2003

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, and Garland, Circuit Judges, and Williams, Senior Circuit Judge

ORDER

Upon consideration of petitioner's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.